STATE OF NEW YORK
SUPREME COURT : COUNTY OF WESTCHESTER

KUSHTRIM LAJQI,
AND OTHERS SIMILARLY SITUATED,

Plaintiffs,

Index No.: 68266/2017

-vs-

BAR TACO PORT CHESTER, LLC d/b/a "bartaco,"

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION FOR A HIPAA QUALIFIED ORDER FOR HEALTH DEPARTMENT RECORDS, AND APPOINTING A THIRD-PARTY ADMINISTRATOR

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Term	Definition
bartaco	The defendant, Bar Taco Port Chester, LLC d/b/a "bartaco," in this action
The Health Department	The Westchester County Department of Health
Oswald Aff.	The Attorney Affirmation of Phillip A. Oswald In Opposition to the Motion for a HIPAA Qualified Order for Health Department Records, and Appointing a Third-Party Administrator, dated December ___, 2018
Plaintiffs' Memorandum	The Plaintiffs' Memorandum of Law In Support of Motion for a HIPAA Qualified Order for Health Department Records, and Appointing a Third-Party Administrator, dated October 25, 2015
The health advisory	The health advisory for potential Hepatitis A Exposure at the defendant's Port Chester restaurant released by the Westchester County Health Department on October 25, 2017.

PRELIMINARY STATEMENT

Based on the federal standard requiring individual notice, plaintiffs' counsel argues that the Health Department's release of names and addresses of individuals who received preventative treatment for Hepatitis A is necessary to provide individual notice to potential class members. Unlike its federal counterpart, however, New York's notice rule imposes no strict requirement of individual notice. Furthermore, plaintiffs have failed to meet their burden that providing notice to individuals from the Health Department's list would not be over-inclusive. In this case, there is no indication that the Health Department ensured or how it ensured that treatment was given only to those who actually ate at the restaurant within the applicable time period and only to those who did not have a history of Hepatitis A infection or vaccination. Moreover, even if disclosure of the names and addresses is authorized under HIPAA, New York's physician-patient privilege is more stringent than HIPAA and bars disclosure here. Lastly, there is no need for the parties to incur the unnecessary cost or risk entailed with appointing a third-party administrator. Therefore, this Court should deny this motion and the notice plan proposed by plaintiffs' counsel in its entirety.

STATEMENT OF FACTS AND PROCEDURAL POSTURE

A more complete statement of the factual and procedural history of this case is provided in bartaco's opposition papers to plaintiffs' initial motion for class certification, which are submitted with this opposition as well (Oswald Aff., Ex. B). Briefly, this case arises out of a health advisory from the Health Department advising members of the public to obtain testing and vaccination for Hepatitis A if they ate at bartaco's restaurant in Port Chester between October 12, 2017 and October 23, 2017 (*id.*, Ex. D). On October 24, 2017, bartaco first learned that one of

its employees had tested positive for Hepatitis A (*id.*). Bartaco immediately reported this to the Health (*id.*). On the same day that it reported this, bartaco closed the restaurant for cleaning and did not open again until receiving permission from the Health Department (*id.*).

On October 25, 2017, the Health Department issued the health advisory, in which it stated that it "is recommending that individuals who ate or drank at bartaco . . . between October 12th and 23rd seek preventive treatment against Hepatitis A" (Oswald Aff., Ex. D). The health advisory was publicized through ordinary media, rather than individual notice to those who ate at bartaco (*see id.*). The health advisory noted that preventive treatment was being recommended only for those who could obtain the treatment within two weeks after eating at the restaurant and who did not have prior exposure to or vaccination for Hepatitis A (*id.*). The health advisory then listed three specific dates on which the Health Department would provide preventive treatment — *i.e.*, on October 26th, October 27th, and October 28th (*id.*). Plaintiffs' counsel has alleged that approximately 2,900 people sought preventive treatment through the Health Department as a result of the health advisory (Plaintiffs' Memorandum at 1).

No evidence, however, has been presented in plaintiffs' papers to demonstrate that the Health Department performed any kind of screening to ensure that those seeking to obtain preventive treatment fit the criteria listed in the health advisory. In fact, this omission is telling because thousands of pages of documents have been obtained from the Health Department through judicial subpoenas, as well as requests under the Freedom of Information Law (Oswald Aff., Ex. F; Ex. G). Specifically, plaintiffs' counsel have not produced any evidence showing that any screening occurred or whether such screening was sufficient to

exclude those who did not eat at the restaurant at all, who did not eat there during the specific dates, who previously had a Hepatitis A infection, or who had previously had a Hepatitis A vaccination. Accordingly, obtaining a list of those who received treatment vis-à-vis the Health Department does not necessarily mean that the individuals on that list meet the criteria of the health advisory and, therefore, the criteria of this class.

Additionally, following the Health Department's announcement, bartaco set up vaccination and testing clinics at various commercial locations (Oswald Aff., Ex. C at ¶ 13). Bartaco also coordinated with private physicians for customers who felt that they needed additional medical treatment and/or evaluation (*id.*). To coordinate and facilitate medical treatment for those affected by the Health Department's health advisory, bartaco publicized a hotline for customers to call in the same manner in which the health advisory was published (*id.* at ¶ 13-15). In fact, the hotline itself was included in the health advisory (*id.*, Ex. D). Bartaco hired an independent contractor to organize and administer an out-of-court reimbursement process through this hotline (Oswald Aff., Ex. C at ¶ 13-15). This hotline remains open, and bartaco continues to resolve claims through it *(id.*).

ARGUMENT

Plaintiffs' counsel now seeks a HIPAA Qualified Order for the Health Department to release their list of the names and addresses of those persons who received preventative treatment following the health advisory (*see generally* Plaintiffs' Memorandum). However, plaintiffs' counsel has not offered any reason for why individual notice is necessary or why less-intrusive means of notice is not sufficient, plaintiffs' counsel has not shown that the

Health Department's list is not over-inclusive, and plaintiffs' counsel has not even addressed the physician-patient privilege under New York law (Point I, infra). Plaintiffs' motion also requests this Court to appoint the Notice Company as a claims administrator in this case (*see generally* Plaintiffs' Memorandum). Appointing a third-party administrator, however, is an unnecessary cost and presents an unnecessary risk of disclosure of confidential health information of those who have not consented to its disclosure (Point II, infra).

POINT I

PLAINTIFF'S REQUEST FOR A HIPAA QUALIFIED ORDER DIRECTING THE RELEASE OF NAMES AND ADDRESSES FROM HEALTH DEPARTMENT'S RECORDS SHOULD BE DENIED.

Unlike its federal counterpart, under Article 9, a party must present proof for why individual notice is required in a class action over other less intrusive forms of notice. *See* CPLR § 904; *Cox v. Microsoft Corp.*, 2006 WL 6554176 (Sup. Ct. 2006). Here, as discussed in greater detail below, plaintiffs' counsel has not even attempted to meet their burden, and, accordingly, this Court should deny this motion because: (1) individual notice is not required in New York; (2) individual notice is not proper because the Health Department's proposed list likely is over-inclusive; and (3) the names and addresses on the Health Department's list are protected from disclosure under CPLR § 4504(a).

A. Individual Notice is Not Required in New York.

It is clear that under both New York and federal rules, "[t]he law requires . . . the best notice practicable under the circumstances." *Drizin v. Sprint Corp.*, 7 Misc. 3d 1018(A), 2005 WL 1035823, at *1 (Sup. Ct. 2005) (*citing Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974)). Moreover, although "[f]ederal jurisprudence is helpful" in analyzing Article 9 of the

CPLR, this Court must follow precedent from New York courts with respect to class actions under Article 9 to the extent that it conflicts with the federal rules for class actions. *See City of New York v. Maul*, 14 N.Y.3d 499, 510 (2010); *Saska v. Metropolitan Museum of Art*, 57 Misc. 3d 218, 231 n.7 (Sup. Ct. 2017) ("while adopting the wisdom of the federal courts would certainly be beneficial to our state class action public policy, deference to such wisdom must give way to the bedrock legal principal that a court may not simply ignore the plain meaning of a statute merely because it does not like the public policy implications of such a meaning").

With respect to notice of a class action, federal law and state law are different. In particular, the applicable federal rule "require[s] that individual notice be sent to all class members who can be identified with reasonable effort." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 349 (1978); Fed. Rule Civ. Proc. 23(c)(2)(B). Unlike its federal counterpart, however, New York's notice rule — N.Y. CPLR § 904(b) (McKinney's 2018) — imposes no strict requirement of individual notice. Rather, class actions under Article 9 merely require "reasonable notice of the commencement of a class action . . . in such a manner as the court directs." CPLR § 904(b); *Cox v. Microsoft Corp.*, 2006 WL 6554176 (Sup. Ct. 2006) ("[n]either the CPLR nor due process requires that each class member . . . receive individual notice."); *see also In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154, 157, 160 (1st Dep't 1990), *aff'd as modified*, 77 N.Y.2d 185 (1991) (approving the sufficiency of notice where notice of class action is published in two New York newspapers on one day).

More importantly, the New York Legislature's omission of a strict individual-notice requirement is a deliberate rejection of that requirement because the Legislature used the

federal rules to "model[]" Article 9 and, therefore, any deviation from the federal rules must be presumed to have been intentional. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 93 (2d Dep't 1980); *see also Diegelman v. City of Buffalo*, 28 N.Y.3d 231, 237 (2016) (a court cannot imply a provision into a statute if it was intentionally omitted). Furthermore, the intentional omission of a strict, individual-notice requirement is consistent with the well-settled law that the Legislature intended and contemplated a flexible and pragmatic approach for class actions in general and for notice of the same in particular. *Colt Industries Shareholder Litigation v. Colt Industries, Inc.*, 77 N.Y.2d 185, 196 (1991) ("CPLR Article 9 is remarkably flexible and provides for a wide range of procedural and administrative approaches in the handling of class action disputes"); *Vickers v. Home Federal Sav. And Loan Ass'n of East Rochester*, 56 A.D.2d 62, 65 (4th Dep't 1977) ("CPLR 904(c) gives the court broad discretion in directing the form and manner of notice to be given to class members")

In Plaintiffs' Memorandum, their counsel argues that the Health Department's release of names and addresses of individuals who received preventative treatment for Hepatitis A is necessary to provide individual notice to potential class members (*see* Plaintiffs' Memorandum at 5-7). To support their argument, plaintiffs' counsel relies solely on the federal standard requiring individual notice (Plaintiffs' Memorandum at 3). Blindly relying on federal law, however, is incorrect because it conflicts with New York law on this issue, as individual notice is not required by Article 9. Instead, plaintiffs' counsel must present proof for why individual notice is required over a more reasonable and less intrusive form of notice.[1]

[1] In fact, empirical evidence has shown that notice by publication is less costly and is just as effective, if not more, at providing notice of a class action. *In re Coordinated Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 706, 710 n. 3 (D. Minn. 1975); *In re Domestic Air*

Plaintiffs' counsel has not done so and, in fact, has not addressed any of the three factors that this Court is required to consider under CPLR § 904.[2] Therefore, plaintiffs' counsel utterly has failed to meet their burden, and this Court must deny this motion to the extent that it seeks an order requiring individual notice.

B. Individual Notice is Not Proper Because the Health Department's Proposed List is Over-inclusive.

For the purposes of providing notice to potential class action members, a list is over-inclusive if there is no way to determine who on the list is actually a class member. *Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 327 (E.D. Penn. 1993) (finding that the proposed list would be over-inclusive because there was no way of knowing who on the list was likely to have been exposed to asbestos and which individuals were not); *In re Domestic Air Transp. Antitrust Litigation*, 141 F.R.D. 534, 546 (N.D. Ga. 1992) (court found list over-inclusive when there was no way to determine who on the list was a class member). The burden is upon the plaintiff to provide evidence that the list is not over-inclusive, and that individual notice to those on the list would not provide notice to non-class members. *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 296 (W.D. Tex. 2007) (finding that the notice program proposed by the plaintiffs was overbroad and that plaintiff provided no evidence that notice to non-class members could be avoided). Courts routinely modify proposed notice plans that are overbroad and that

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Transp. Antitrust Litigation, 141 F.R.D. 534, 550 (N.D. Ga. 1992); *Fiala v. Metropolitan Life Ins.*, 17 Misc. 3d 1102(A), 2007 WL 2772230, at *2 (Sup. Ct. 2007). Notably, here, any person on the Health Department's list presumably is on it solely because she or he received notice by way of the publication of the health advisory in ordinary media (Oswald Aff., Ex. C at ¶ 13-15). Hence, if publication by way of ordinary media is sufficient to create the class in the first place, then it should likewise be sufficient to notify the class of the lawsuit.

[2] Much like they did in the underlying motion for certification, plaintiffs' counsel expects this Court to rely on their experiences in other unrelated matters without any thoughtful or meaningful discussion of the applicable precedent on this issue.

provide notice to individuals who do not qualify for the class action. *Tolentino v. C & J Spec-Rent Services, Inc.*, 716 F. Supp. 2d 642, 654-55 (S.D. Tex. 2010) (modifying the plaintiff's proposed notice plan that provided notice to individuals who were not "similarly situated" to the proposed class members).

Even in federal courts, where individual notice is required if class members can be identified, courts have unanimously held that it is not proper to send individual notices to people from an over-inclusive list because it may confuse recipients and encourage responses by non-class members.

- *In re Agent Orange Product Liability Litigation MDL No. 381*, 818 F.2d 145, 169 (2d Cir. 1987) (rejecting argument that individual mail notice should be provided because list included a far greater number of individuals than those who were actually exposed to Agent Orange and thus notice would have been "considerably overbroad");

- *Carlough*, 158 F.R.D. at 327 ("courts have held it is not necessary to send individual notices to an over-inclusive group of people simply because that group contains some additional class members whose identities are unknown");

- *Marcarz v. Transworld Systems, Inc.*, 201 F.R.D. 54, 64 (D. Conn. 2001) (allowing notice by publication because, where list also included non-class members, "sending notice to the admittedly over-inclusive group here would 'most likely confuse the recipients and encourage responses by non-class members'");

- *In re Domestic Air*, 141 F.R.D. at 539-46 (sending notice to larger group "would most likely confuse the recipients and encourage [responses] by non-class members");

- *Skeleton v. General Motors Corp.*, 1987 WL 6281, at *3 n. 3 (N.D. Ill. Feb. 3, 1987) (rejecting use of over-inclusive list because it "could mislead thousands of ineligible [persons] into thinking they qualify to recover in this action" and would "generate considerable confusion and additional expense in administering the settlement.").

In this case, a list of individuals that received preventative treatment from the Health Department would be over-inclusive, as there is no way to determine who on the list is actually within the parameters of the class. In fact, there is no indication that the Health Department ensured or how it ensured that treatment was given only to those who actually ate at the restaurant within the applicable time period and only to those who did not have a history of or a vaccination for Hepatitis A. Instead, the Health Department likely administered preventive treatment liberally out of precaution to anyone who dined at the restaurant on any recent date, to anyone who came into contact with someone who dined there, or to those who were unsure whether they had prior exposure to or a vaccination for Hepatitis A.[3] In other words, it is reasonable to conclude that the Health Department administered preventive treatment to a substantial amount of people who are outside of the class that has been certified. *More importantly, plaintiffs' counsel has not met their burden to prove that the preventive treatment from the Health Department was strictly limited to those who fit the criteria of the class*.

Therefore, any proposed list from the Health Department for individuals who they treated would be overbroad because the class is limited to those who actually dined at the restaurant between October 12th and October 23rd. Moreover, any such list would be overbroad because it will likely include individuals who had prior exposure to Hepatitis A or were previously vaccinated against it. Plaintiffs' counsel have not offered any type of evidence showing that it performed any kind of screening process to ensure that only individuals received

[3] Bartaco certainly is not suggesting that the Health Department erred or did not respond appropriately because broadly and liberally administering preventive treatment to anyone who even possibly could have been exposed was the best way to ensure that the disease did not spread, especially since there are no significant adverse effects from the treatment. However, for the purposes of liability, the class must be limited to those who actually dined at bartaco, those who actually were exposed to Hepatitis A, and those who needed preventive treatment.

preventive treatment if they absolutely met the criteria provided for in the health advisory. This omission by plaintiffs' counsel is telling given that the parties now have thousands of pages of documents from the Health Department (Oswald Aff., Ex. F; Ex. G). Accordingly, blindly providing notice to people on a list from the Health Department would be over-inclusive and, therefore, should not be ordered by this Court based on the case law discussed above.

C. This Court Should Not Order the Disclosure of Names and Addresses on Medical Records Because This Information is Protected By CPLR § 4504(a).

Plaintiffs' counsel has asserted that HIPAA authorizes the disclosure of names and addresses from medical records (*see* Plaintiffs' Memorandum at p. 3). Even if disclosure is permitted under HIPAA, however, New York's physician-patient privilege, which is more stringent than HIPAA, bars disclosure here. N.Y. CPLR § 4504(a) (McKinney's 2018) (a medical professional "*shall not*" disclose information gained during treatment) (emphasis added); *Pal v. New York University*, 2007 WL 1522618, at *3 (S.D.N.Y. 2007); *In re Antonia E.*, 16 Misc. 3d 637, 644-45 (Sup. Ct. 2007). Although a patient's identity normally is not privileged, it becomes privileged under CPLR § 4504(a) and thereby protected from disclosure when the surrounding circumstances would indirectly reveal the patient's medical condition. *See In re Grand Jury Investigation in New York County*, 98 N.Y.2d 525, 531-32 (2002); *Kneisel v. QPH, Inc.*, 124 A.D.3d 729, 729 (2d Dep't 2015); *Pal v. New York University*, 2007 WL 1522618, at *3 (S.D.N.Y. 2007) ("New York law is absolute in that regard").[4]

[4] Courts in other jurisdictions likewise have refused to order the release of patients' names and addresses from a public health authority. *Hannis ex rel. Hannis v. Sacred Heart Hosp.*, 789 A.2d 368, 372 (Pa. Cmwlth. 2001) ("[t]he names and addresses of persons identified by the Bureau of Health in connection with its investigation. . . are confidential information contained in confidential records, and they are not discoverable apart from the records themselves."); *Guardian Home Nursing, Inc. v. Medina Cty. Health Dept.*, 113 Ohio App. 3d 734, 736 (Oh. Ct.

Here, the disclosure of an individual's name and address, even to a nonparty notice company, from the Health Department obviously would reveal the medical condition for which they sought treatment. In fact, the sole reason why their identities and their addresses are being revealed is because they sought preventive treatment for Hepatitis A in the first place. Accordingly, this information is confidential and cannot be disclosed pursuant to CPLR § 4504(a), irrespective of whether HIPAA would authorize its disclosure. Plaintiffs' counsel does not even give passing reference to the confidentiality requirement of the CPLR and, instead, merely expects this Court to go along with their assembly-line litigation strategy that they have used elsewhere. Nonetheless, under *Kneisel* and the other authorities cited above, disclosing this confidential information clearly would be improper — especially since, as discussed above, the identities and addresses of those who are not even eligible for participation in the class likely will be disclosed.

POINT II

PLAINTIFFS' REQUEST TO APPOINT THE NOTICE COMPANY AS A THIRD-PARTY ADMINISTRATOR FOR THIS CLASS ACTION SHOULD BE DENIED.

As demonstrated above, individual notice is not proper for this case, and, therefore, there is no need for the parties to incur the added cost of appointing a third-party administrator. However, assuming, arguendo, that this Court were to find that individual notice is proper, the parties should not incur the added cost and added risk of employing a third-party administrator. Instead, the list of names and addresses can be maintained by the parties'

App. 1996) (finding it was an error for the trial court to order the Health Department's release of names and addresses).

attorneys for purposes of disseminating the individual notices and then destroyed in order to ensure that no confidential medical information is disclosed. Moreover, any and all communications with these individuals prior to them signing up as members of the class should require preapproval from the Court. Therefore, this Court should not appoint a third-party administrator because it would be an unnecessary cost and, more importantly, an unnecessary risk of unauthorized disclosure of confidential medical information that is protected under state and federal law.

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CONCLUSION

Individual notice is improper for this class action for the following reasons: (1) it is not required under New York's class action law, and plaintiffs' counsel has presented no evidence to this Court or during discovery that individual notice is the best form of notice for this case; (2) plaintiffs' counsel have not met their burden to show that a list of those treated by the Health Department would be limited to those who fall within the criteria of the class; and (3) the disclosure of names and addresses from the Health Department's list would unnecessarily violate CPLR § 4504(a). Furthermore, this Court should deny the request from plaintiffs' counsel for the Notice Company to be appointed as a claims administrator because doing so presents an unnecessary cost and risk. Accordingly, bartaco respectfully requests that this Court deny the motion by plaintiffs' counsel for a HIPAA Qualified Order and appointment of the Notice Company as the third-party administrator for this case, as well as grant it such other and further relief that this Court deems just and proper.

Dated: December 4, 2018
Saratoga Springs, New York

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